United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 74-2557

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LIZDALE KNITTING MILLS, INC.,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by threatening to discharge and thereafter discharging four employees because of their union activities, and violated Section 8(a)(1) of the Act by ordering union representatives, in the presence of employees, out of the plant while they were attempting to secure the discriminatees' reinstatement.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, *et seq.*) for enforcement of its order against Lizdale Knitting Mills, Inc. (herein "the Company") issued on June 25, 1974, and reported at 211 NLRB No. 111 (A. 3-39).[1] This court has jurisdiction of the proceedings, the unfair labor practices having occurred at Glendale, New York, where the Company manufactures sweaters.

I. THE BOARD'S FINDINGS OF FACT

A. On May 29, Company officials observe the Union soliciting the four dischargees just outside the factory.

The Company factory is on the second floor and has only one entryway – a flight of eight outside steps at the corner of the plant building which connect with an inside stairway running directly into the upstairs shop (A. 5; 50, 66-68, 70, 71-72, 74, 106-107, 108-110, 126).

Two representatives of the Union[2] began soliciting Company employees and passing out Union authorization cards near the foot of the outside steps about plant quitting time on Tuesday afternoon, May 29, 1973 (A. 20; 55-56, 63, 69, 117).[3] The four dischargees – Abelardo Ceballos,

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1 "A." references are to the printed appendix herein. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2 Knitgood Workers Union Local 155, International Ladies' Garment Workers Union, AFL-CIO.

3 All dates are 1973 unless otherwise indicated.

Luz Maria Villada, Marta Guerrero, and Eucaris Ceballos –[4] were among approximately 20 employees who took cards from one Union organizer, Alex Quinones, near the plant steps (A. 20; 55-57, 63-64, 80-81, 86-87, 95-96). The four also stopped to talk with Quinones, who then was standing two to three feet from the base of the outside steps (A. 6-7, 20-21; 56-57, 69).

At this time, a female employee came downstairs and accepted a card from Quinones. When he told her that the Union was organizing, she ran back upstairs into the factory (A. 20; 57, 80-81, 86, 95-96, 100-102). A few minutes later, Company President Hyman Gelbord and Company Secretary-Treasurer Imre Haas leaned out the second floor main office window[5] and saw Quinones talking with the four dischargees, who then were holding authorization cards in their hands (A. 20; 57-59, 73-74, 77-78, 81, 90-91, 92, 95-96, 100, 102, 104, 105). Forelady Ella Herskovitz, supervisor of female plant employees, also looked out at them a few moments later (A. 20; 41, 48, 59, 74, 80-81, 95-96, 104, 149).

When Quinones and the four employees realized that their activities were being watched by the Company, they walked around the corner of the building to get out of sight (A. 20; 60, 74, 81, 87-88, 90, 100). Abelardo and the three others then each signed a Union authorization card. They were the only employees who signed for the Union that day (A. 65, 70, 74, 81, 88, 96, 100). Quinones also gave Abelardo some blank cards to distribute at work (A. 60, 81, 97).

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[4] The four employees were generally referred to in the Board decision as "the Ceballos group" (A. 24-25), but they also were sometimes referred to as "the Ceballos family" because Eucaris and Marta are Abelardo's sisters and Luz Maria is his girlfriend (A. 19; 120, 162).

[5] Also referred to in the record as Window #6 (A. 110).

B. On May 30, Abelardo distributes Union cards at work and Supervisor Herskovitz threatens the four with discharge; Company President Gelbord discharges them on May 31.

The next morning, May 30, Abelardo distributed cards to several fellow employees at work and several signed (A. 65, 82). While the Ceballos were eating lunch in the plant that day, Supervisor Herskovitz came over to them and declared, "If somebody fills out and signs the union card, no more work. They will be fired" (A. 7, 22-23; 82-83, 88). That day or the next, Supervisor Herskovitz gave Company President Gelbord several unsigned Union authorization cards which employees had given her (A. 117-118, 132, 137, 139-140, 154).

The next day, at the end of work, Gelbord discharged the four (A. 23-24; 41, 48, 83, 137). Gelbord asserted that there was no more work because business was slow, but Abelardo protested that new employees had just been hired, including one hired the day before to perform his job (A. 23; 83, 97, 130-131). Abelardo also charged that the real reason was his Union activities (A. 23; 83-84, 98).

C. President Gelbord refuses the Union representatives' request that he reinstate the four; Supervisor Herskovitz orders them out of the plant, and Gelbord threatens to call the police if they do not leave.

On June 4, chief Union organizer Norman Lewis accompanied by Quinones and another Union representative, went with the four discharged employees to the plant to seek their reinstatement. Lewis presented his business card to Gelbord at the upstairs factory entrance and requested that they be reinstated (A. 24; 61, 76, 98, 162). Gelbord refused and declared that he would never accept the Union and would rather close down the shop *(ibid.)*.

Meantime, several employees came over and declared loudly that they did not want the Union (A. 24; 143-144, 159). Supervisor Herskovitz, who was present with the employees, told Quinones to "go out, you have no business to be here" (A. 24; 156). Gelbord refused to talk further with the Union, ripped up Lewis' card, and threatened to call the police unless the Union representatives left the plant immediately (A. 24; 61-62, 75, 84, 98-99, 119). They and the four dischargees departed (A. 24; 62, 85, 119-120).

II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board found, in agreement with the Administrative Law Judge, that the Company violated Section 8(a)(3) and (1) of the Act by threatening to discharge and thereafter discharging the four employees because of their union activities, and violated Section 8(a)(1) of the Act by ordering Union representatives, in the presence of employees, out of the plant while they were attempting to secure the four's reinstatement (A. 19-25).[6]

The Board's order requires the Company to cease the unfair labor practices found. Affirmatively, the order requires the Company to offer the four employees immediate and full reinstatement to their former, or substantially equivalent, jobs with backpay, and to post the usual notices (A. 14-18, 25-26).

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[6] Board Member Kennedy, dissenting, would have rejected the Administrative Law Judge's credibility determinations and dismissed the complaint in its entirety (A. 27-39).

ARGUMENT

THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY THREATENING TO DISCHARGE AND THEREAFTER DISCHARGING THE FOUR EMPLOYEES BECAUSE OF THEIR UNION ACTIVITIES, AND VIOLATED SECTION 8(a)(1) OF THE ACT BY ORDERING THE UNION REPRESENTATIVES, IN THE PRESENCE OF EMPLOYEES, OUT OF THE PLANT WHILE THEY WERE ATTEMPTING TO SECURE REINSTATEMENT OF THE FOUR.

A. Substantial evidence on the whole record amply supports the Board's findings.

The Board's findings here are entitled to affirmance because they are supported not only by contested evidence which the Board properly credited but also by "circumstantial evidence and 'inferences of probability drawn from the totality of other facts' " which the Company admitted. See, *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972) and A. 25. Nor is the "fact that the Board's choice is one of two conflicting alternatives and that evidence and inferences exist to support the rejected choice . . . a sufficient ground for refusing to order enforcement." *N.L.R.B. v. Holly Bra of Calif.*, 405 F.2d 870, 872 (C.A. 9, 1969).[7]

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[7] This standard of review stems from the provision of Section 10(e) of the Act that: "The findings of the Board with respect to questions of fact if supported by substantial evidence on *the record considered as a whole* shall be conclusive." [Emphasis added.] *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 485-486 (1951).

It follows that the Administrative Law Judge "has the responsibility of evaluating the credibility of witnesses since he is in a position to observe demeanor and other firsthand indications of truthfulness." *N.L.R.B. v. Tri-State Stores, Inc.*, 477 F.2d 204, 206 (C.A. 9, 1972), cert. denied, 414 U.S. 1130. Accord: *N.L.R.B. v. Dinion Coil Co.*, 201 F.2d 484, 490 (C.A. 2, 1952) (the Board's acceptance of an evidential finding should not be upset by the reviewing court "unless on its face it is hopelessly incredible . . . or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony. . . . "); *N.L.R.B. v. A & S Electronics Die Corp.*, 423 F.2d 218, 220 (C.A. 2, 1970), cert. denied, 400 U.S. 833.

It is equally well-settled that an "illegal motive may be found from a combination of factors such as 'general bias or hostility toward the Union' . . . variance from the employer's 'normal employment routine' . . . and an implausible explanation by the employer for its action." *McGraw-Edison Co. v. N.L.R.B.*, 419 F.2d 67, 75 (C.A. 8, 1969) (citations omitted). Also, "[t]he abruptness of a discharge and its timing are persuasive evidence as to motiviation." *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829. These factors also support an inference of company knowledge of employees' protected activities. *N.L.R.B. v. Mid-State Sportswear, Inc.*, 412 F.2d 537, 539 (C.A. 5, 1969); *Famet, Inc. v. N.L.R.B.*, 490 F.2d 293, 295 (C.A. 9, 1973); *N.L.R.B. v. Wal-Mart Stores, Inc.*, 488 F.2d 114, 116 (C.A. 8, 1973), and other cases cited there including *Long Island Airport Limousine Service, supra.*

All these factors are present here. As shown in the Statement, *supra*, the credited evidence establishes that the Company knew from the outset that Abelardo Ceballos and his "family" were interested in the Union when Company officials saw them talking to the Union organizer and then move around the corner to escape surveillance. And Company admits that, shortly after Abelardo distributed cards the next day at work, Supervisor Herskovitz obtained some of the cards and promptly turned them over to the Company president. The same day, according to the credited evidence, Herskovitz made a special point of threatening the four that those who signed cards "will be fired." The next day all four were fired – for an asserted reason which the Company admitted at the hearing was false. To paraphrase *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 465 (C.A. 2, 1973) (discharge four days after threat), "The closeness in time of [the] threat

and [employees'] discharge strongly suggests that the latter was the effectuation of the former." Here, there was even more "stunningly obvious timing"[8] – since there was little more than 24 hours between the threat and the discharges which effectuated it. See, *Long Island Airport Limousine, supra, loc. cit.;* cases there cited, *N.L.R.B. v. Tru-Line Metal Products Co.*, 324 F.2d 614, 616 (C.A. 6, 1963), cert. denied, 377 U.S. 906. And any doubt as to the Company's antagonism to organization of its employees was removed when the Company president, in refusing to reinstate the Ceballos, declared that he would close the plant before he would deal with a union. *Supra*, p. 4. Further, he underscored this anti-union animus by tearing up the business card of the Union representatives who sought the Ceballos' reinstatement and threatening to call police unless they left immediately. Finally, the Company's admission that it gave the Ceballos a false reason for their discharge as well as its attempt at the Board hearing to shift to another reason, which the Administrative Law Judge properly found to be patently pretextual, further reinforce the finding of an unlawful motive (A. 25). See, *Trey Packing, Inc. v. N.L.R.B.*, 405 F.2d 334, 339 (C.A. 2, 1968), cert. denied, 394 U.S. 919, and *McGraw-Edison, supra; N.L.R.B. v. Griggs Equipment Co.*, 307 F.2d 275, 278 (C.A. 5, 1962) (companys explanations "failed to withstand scrutiny").

In sum, the discharge of the leading union adherents is the classic method of undermining an organization campaign, *N.L.R.B. v. George J. Roberts & Sons, Inc.*, 451 F.2d 941, 945 (C.A. 2, 1971), and, as we have shown, substantial evidence on the whole record amply supports the Board's findings that the Company violated Sections 8(a)(1) and (3) of the Act by discharging the four Ceballos for their union

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[8] *N.L.R.B. v. Rubin*, 424 F.2d 748, 750 (C.A. 2, 1973).

activity and by its coervive conduct toward employees' exercise of their Section 7 rights when the Union agents sought their reinstatement.

B. The Company's attacks upon the Board's credibility resolutions are without merit.

The Company assailed the credibility resolutions of the Administrative Law Judge with regard to two findings: (1) that, from the plant windows, the Company could have seen the Ceballos talking to the Union agent and (2) that the Company's claim that it actually discharged the Ceballos for suspicion of stealing sweaters was false. We discuss these contentions *seriatim*, and show that they are both without merit.

1. The Company's observation of the Ceballos talking to the Union agent.

The Administrative Law Judge's determination that the Company officials could have seen - and did see - the Ceballos talking to the Union representative was based not only upon his evaluation of the respective witnesses' demeanor and analysis of their testimony but also upon a view of the site in the presence of opposing counsel.

The Union agent to whom the Ceballos talked testified that he was standing "about two or three feet" away from the bottom of the eight steps leading up to the building entrance (A. 69). Abelardo Ceballos testified (A. 90) that he and his group were standing "[v]ery close" to the Union agent "because we were receiving cards." Both testified, as did Marta Ceballos (A. 58-59, 73-74, 80-81, 90, 96, 100), that they saw President Gelbord and Secretary-Treasurer Haas, and later Supervisor Herskovitz, watching them out of "the big office window" (A. 102, 96).

Window #6 is the "main office" window (A. 110), the sill of which is about five feet above the floor (A. 52). Company President Gelbord testified that he had looked out of that window by standing on a chair, but even doing so, he could see only the buildings and sidewalk across the street from his plant (A. 11, n. 13; 114). However, after the view of the premises by the Administrative Law Judge and both counsel, Company counsel filed a statement (A. 51) that "[t]he *ground* in front of the outside stairway at Respondent's plant is visible to an observer in window #6 to a point *two feet* from the front of the stairway . . ." (A. 21; 51). [Emphasis added.] Counsel for the General Counsel filed a virtually identical statement (A. 53). From these statements, the Board majority concluded, in agreement with the Administrative Law Judge, that "there would certainly be visibility of a person of normal height even if he were standing only 1 [one] foot away from the bottom of the steps" (A. 21, n. 6). However, Company counsel contended (A. 51) that "a person standing within two feet of the stairway cannot be seen from this window." The Board (A. 21) properly rejected this Company contention as "a physical impossibility" unless "the person had less height than a midget."

Accordingly, the Board plainly did not abuse its broad discretion in this regard by affirming the Administrative Law Judge's credibility resolutions, not only upon the basis of his evaluations of demeanor and his view of the premises, but also because "the crucial objective physical factors, as agreed to by opposing counsel, support his credibility findings" (A. 22).

2. The discrediting of the Company's claim that it discharged the Ceballos for suspicion of theft

The Company's defense that it discharged the Ceballos for stealing sweaters is equally untenable. While Company President Gelbord testified that he had discovered, as early as March, that sweaters were missing and that Supervisor Herskovitz had told him in mid-May that two of the discharged employees, Eucaris Ceballos and Luz Maria Villarda, had taken sweaters (A. 156, 159-162),[9] he did not claim to have taken any action until Friday, May 25 – four days before the union activity began.

That day, Gelbord testified, he set "a trap" by stacking 18 bundles each containing a dozen or so sweaters on a packing table in neat piles (A. 127). However, instead of watching for the culprits or having someone else do so, he assertedly went to answer a telephone call *(ibid.)*. After completing the call, he testified, he ran back to the table and found "the whole thing was distorted " [sic], "four or six bundles" of sweaters or "something like that" were missing, and even the forelady (apparently Herskovitz) was gone although she "goes always later than everybody else" by 15 minutes or half an hour (A. 128-129). And when he asked her about it the next week, she knew nothing (A. 129). Gelbord sought to justify the week's delay between the alleged May 25 theft and the May 31 discharges on the ground that he had to check the shipping records to verify whether the sweaters were actually missing or merely misplaced (A. 129-130). On May 31, he testified, he called Company Secretary-Treasurer Haas and told him "I think

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[9] Herskovitz testified only that two employees had brought her a grocery sack containing five sweaters which one of the two said Eucaris and Luz had left in a restroom (A. 151-153). Herskovitz admittedly had seen nothing herself (A. 150-151, 155-156).

this [is] the four" – the Ceballos, adding "it's enough for me to be suspicious on it," and discharged them (A. 130). Gelbord admitted that he told the employees only that they were being discharged for lack of work and that this reason was false (A. 131-132).

On this equivocal testimony, it is submitted, the Board was amply justified in discrediting this defense as a "complete fabrication" contrived to conceal an unlawful discriminatory motive (A. 10). See, *e.g., N.L.R.B. v. Milco, Inc.*, 388 F.2d 133, 138-139 (C.A. 2, 1968). More, it could also properly find, as it did (A. 25), that "the shifting reasons given for the discharges, the first of which was admittedly untrue" reinforced the other evidence that the Ceballos were discharged because of their union activity, in violation of Sections 8(a)(3) and (1) of the Act. *Milco, supra, loc. cit.*

CONCLUSION

For the reasons stated above, it is submitted that the Board's order should be enforced in full.

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March, 1975.

UNITED STATES COURT OF APPEALS

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	)	
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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 3rd day of March, 1975

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. LIZDALE KNITTING MILLS, INC., Respondent.	)	No. 74-2557

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the APPENDIX in the above-entitled case, on the following counsel of record, this 12 day of February 1975.

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Subscribed and Sworn to before me this